FOR ARGUMENT

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No. 00-853

IN THE
SUPREME COURT OF THE UNITED STATES

CORRECTION OFFICER PORTER AND
CORRECTION OFFICER WILLETTE,
Petitioners,
v.

RONALD NUSSLE,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONERS

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SUMMARY OF THE ARGUMENT

The petitioners hereby reply to respondent's brief on the merits. As discussed in the petitioners' opening brief, the Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 100 Stat. 1321-73 (1996)("PLRA"), *codified* at 42 U.S.C. § 1997e(a), requires prisoners to exhaust available administrative remedies before bringing "an action with respect to prison conditions[.]" Contrary to respondent's contention, the phrase "action with respect to prison conditions" encompasses claims concerning particular instances of unconstitutional conduct, including claims of excessive force. This conclusion is compelled by the relevant decisions of this Court, particularly in *McCarthy v. Bronson*, 500 U.S. 136 (1991); *Wilson v. Seiter*, 501 U.S. 294 (1991); and *Preiser v. Rodriguez*, 411 U.S. 496 (1973). The cases relied upon by respondent -- *Hudson v. MacMillian*, 503 U.S. 1 (1992), and *Farmer v. Brennan*, 511 U.S. 825 (1994) -- concern the narrow and unrelated issues of the proof and mental states necessary to establish different Eighth Amendment claims. *Farmer* and *Hudson* simply have nothing to do with the PLRA's exhaustion of administrative remedies requirement or the principles underpinning it.

The interpretation of the PLRA's exhaustion requirement advocated by the petitioners and adopted by six Courts of Appeal does not, as respondent argues, strip the limiting words "with respect to prison conditions" of their natural meaning. *See* Petitioners' Opening Brief at 6 n. 3 (citing Circuit Court decisions). Rather, Congress' use of this language, consistent with this Court's use of the same or similar language in *Preiser*, *Bronson*, and *Wilson*, excludes only *habeas corpus* petitions challenging the fact or duration of confinement, which are subject to independent exhaustion requirements, and claims preceding and unrelated to a would-be inmate plaintiff's incarceration.

Moreover, as evidenced by its post-*Nussle* decisions, the Court of Appeal's interpretation of Section 1997e(a) clearly contravenes Congress' intent by unnecessarily burdening the district courts and significantly weakening the PLRA's exhaustion requirement.

ARGUMENT

A. UNDER THE RELEVANT DECISIONS OF THIS COURT, A CLAIM OF EXCESSIVE FORCE IS AN ACTION WITH RESPECT TO PRISON CONDITIONS FOR PURPOSES OF THE PLRA'S EXHAUSTION REQUIREMENT

In the face of overwhelmingly persuasive caselaw to the contrary, respondent nevertheless argues that this Court's Eighth Amendment decisions require the exclusion of claims of single instances of unconstitutional conduct, such as excessive force claims, from 1997e(a)'s exhaustion requirement. *See* Respondent's Brief at 12-19. Specifically, respondent relies on this Court's decisions in *Farmer v. Brennan*, 511 U.S. 825 (1994), and *Hudson v. McMillian*, 503 U.S. 1 (1992). Those decisions, however, arose in markedly different contexts and concern the narrow and entirely unrelated issues of the proof and mental states necessary to sustain different Eighth Amendment claims. *See Farmer*, 511 U.S. at 835-36 (discussing distinctions in mental state requirement between excessive force and deliberate indifference claims under the Eighth Amendment); *Hudson*, 503 U.S. at 9 (holding that no significant physical injury needed to sustain claim of excessive force). There is no evidence that Congress intended somehow to incorporate the evidentiary distinctions established in *Hudson* and *Farmer* into the preliminary exhaustion requirement of Section 1997e(a).

Those cases say nothing about classifying inmate claims so as to ease judicial burdens, decrease federal court entanglement in prison administration, and reduce the number of inmate lawsuits filed under 42 U.S.C. § 1983, all of which Section 1997e(a) was designed to facilitate, *see, e.g., Booth v. Churner*, 121 S.Ct. 1819, 1823 (2001); *see also* 141 Cong. Rec. S14418 (daily ed. Sept. 27, 1995)(statement by co-sponsor Senator Hatch)(describing purpose of PLRA as aimed at reducing the "crushing burden" of inmate suits on courts); *Id.* at 14573 (statement of Senator Kyl)("An exhaustion requirement is appropriate for prisoners given the burden that their cases place on the Federal court system, the availability of administrative remedies, and the lack of merit of many of the claims."). Conversely, this Court's decisions in *McCarthy*, *Preiser* and *Wilson* speak directly to those subjects and compel the conclusion that claims alleging single instances of unconstitutional conduct are "actions ... with respect to prison conditions" for purposes of Section 1997e(a). Neither respondent nor the Court of Appeals below has offered a convincing reason to deviate from those decisions.

In *Hudson v. McMillian*, 503 U.S. 1, 7-9 (1992), this Court considered the question of whether a prisoner claiming excessive force must allege and prove significant injury. Respondent relies heavily on the fact that the Court in *Hudson* distinguished excessive force claims from both medical deliberate indifference claims and what it termed, without elaboration, "conditions of confinement" claims. *Id.* at 8-9. The Court made this distinction, however, for the exceedingly narrow and limited purpose of clarifying the type of harm that must be shown to make out different Eighth Amendment claims. The Court's discussion and holding in *Hudson* did not in any way concern the far more basic, preliminary issue presented here: whether an inmate alleging excessive force may bring his claim directly into

federal court. More generally stated, *Hudson* concerned what the inmate must show once in court to prevail, but not whether the inmate may come to court in the first place.

Similarly in *Farmer v. Brennan*, 511 U.S. 825 (1994), respondent's other principal case, the Court again clarified a finer point regarding the proof necessary to establish different Eighth Amendment claims. Specifically, in *Farmer*, the Court distinguished the mental state that must be shown to prevail on an excessive force claim from that in a claim "challenging conditions of confinement." *Id.* at 835-36. Again, however, the Court did not consider or discuss whether the district court should entertain the case in the first place or whether it should render judgment on the merits. Rather, as in *Hudson*, the Court clarified what an inmate plaintiff must show in order to prevail and obtain judgment. Considerations of judicial economy and deference to state authorities -- the key purposes underlying § 1997e(a) -- simply did not enter into the equation in *Hudson* and *Farmer*.

In *Preiser v. Rodriguez*, 411 U.S. 496, 498-499 *(1973)*, this Court was asked to make a fundamental determination about the kinds of inmate claims that may be asserted in the district court under 42 U.S.C. § 1983, a question far more analogous to the present one than those decided in *Hudson* and *Farmer*. The *Preiser* Court held that an inmate alleging unconstitutional deprivations of good time must pursue a federal *habeas corpus* petition, which would require exhaustion of state court *habeas corpus* remedies, rather than seek equitable relief under 42 U.S.C. § 1983. In so holding, the Court divided the universe of inmate claims into two broad categories -- challenges to "the fact or length of custody of confinement" and all other constitutional challenges by a prisoner to "the conditions of his prison life." *Id.* at 499. As examples of claims in the second category, the Court cited three cases, all involving single instances of unconstitutional conduct:

Cooper v. Pate, 378 U.S. 546 (1964)(denial of religious publications); *Houghton v. Shafer*, 392 U.S. 639 (1968)(confiscation of legal materials); and *Haines v. Kerner*, 404 U.S. 519 (1972)(placement of inmate in solitary confinement). Under *Preiser*, this Court clearly considered a claim alleging a single instance of unconstitutional conduct, such as the momentary application of excessive force, as concerning conditions of prison life.

Preiser is important not only for the way it categorized inmate claims, but for its context and policy underpinnings, which resonate clearly in this case. In drawing a bright line between challenges to the fact or duration of confinement on the one hand and all other prisoner claims on the other, the *Preiser* Court did not concern itself with the niceties of evidentiary requirements and necessary mental states as it had in *Farmer* and *Hudson*. Instead, the Court made a far more basic determination as to the types of inmate cases the district courts should entertain and when they should entertain them.

Because this is precisely the sort of determination the Court must make in this case, there is no compelling reason to revise the categories established by *Preiser*. The fact that *Hudson* and *Farmer* may have distinguished the proof requirements applicable to excessive force claims from those applicable to other claims under the Eighth Amendment in no way indicates that such claims are to be treated differently for the preliminary purpose of determining when and how such claims may first be presented to the district courts under the PLRA. *See, e.g., Wilson v. Garcia*, 471 U.S. 261, 266 (1985)(requiring uniformity of treatment for all claims asserted under 42 U.S.C. § 1983, regardless of precise constitutional claim at issue, for purposes of statute of limitations, noting that the "federal interests in uniformity, certainty, and the

minimization of unnecessary litigation all support the conclusion that Congress favored this simple approach.")

Moreover, just as Congress intended Section 1997e(a) to promote deference to state prison authorities, *Preiser* was grounded on "a proper respect for state functions[,]" *Id.* at 491. Indeed, the Court noted that:

> It is difficult to imagine an activity in which a State has a stronger interest, or one that is more intricately bound up with state laws, regulations, and procedures, than the administration of its prisons ... Since [the] internal problems of state prisons involve issues so peculiarly within state authority and expertise, the States have an important interest in not being bypassed in the correction of those problems ... The strong considerations of comity that require giving a state court system that has convicted a defendant the first opportunity to correct its own errors thus also require giving the States the first opportunity to correct the errors made in the internal administration of their prisons.

Id. at 492.

The Court's reasoning in *Preiser* applies just as forcefully to exhaustion of administrative remedies under the PLRA as it does to exhaustion of state court *habeas* proceedings -- both of which provide state authorities an opportunity to address potential problems in prison administration and avoid, or at least reduce, entanglement of the federal judiciary in state functions. *See Booth v. Churner*, 206 F.3d 289, 295 (3d Cir. 2000)(noting that Congress intended by the PLRA to "reduce the intervention of federal courts into the management of the nation's prison

systems.") Nothing about an excessive force claim -- or a claim of any sort of isolated incident of unconstitutional conduct -- magically diminishes or negates the vital state interests recognized in *Freiser*. To the contrary, common sense suggests that state prison authorities have far stronger, more pressing interests in learning of and addressing the potential for physical abuse by correction officers than they would in learning of bad haircuts, the failure to invite an inmate to a pizza party, or other kinds of inmate complaints that respondent would presumably concede must be exhausted before suit. *See* 141 Cong. Rec. S26,548 (1995)(statement of Sen. Kyl characterizing examples of lawsuits filed by prisoners).

Even more compelling is this Court's decision in *McCarthy v. Bronson*, 500 U.S. 136 (1991), which interpreted a provision in the Magistrate's Act permitting nonconsensual referral to magistrates of "prisoner petitions challenging conditions of confinement." *See* 28 U.S.C. § 636(b)(1)(B). Not only was the statutory language at issue in *Bronson* substantially identical to that under consideration here, but the precise question to be decided was the same as that now before the Court: whether an allegation of a specific episode of misconduct is a claim concerning conditions of confinement.

The *Bronson* Court explicitly rejected the notion advanced by respondent here and by the Court of Appeals below that "prisoner petitions should be divided into subcategories[,]" holding instead "that Congress intended to authorize the nonconsensual reference of all prisoner petitions to a magistrate." *Bronson*, 500 U.S. at 139. The Court in *Bronson* endorsed *Preiser's* "two broad categories of prisoner petitions: (1) those challenging the fact or duration of confinement itself; and (2) those challenging the conditions of confinement." *Id.* at 141. The Court held further that its "description in *Preiser* of the latter category unambiguously embraced the kind of single episode cases

that [the inmate's] construction would exclude." *Id.* at 142. There is simply no conceivable reason -- and certainly none has been offered by the respondent -- why *Bronson's* holding should not apply in the present case.

Bronson is particularly forceful as precedent in the present context because Congress employed strikingly similar language to advance strikingly similar goals in both the Magistrate's Act and the PLRA. As with the PLRA, a "central purpose of the 1976 amendment to the Magistrate's Act was to .... to assist federal judges 'in handling an ever-increasing caseload.'" *Bronson*, 501 U.S. at 142-43 (quoting S. Rep. No. 94-625, p. 2 (1976)); *see also* 141 Cong. Rec. S14418 (daily ed. Sept. 27, 1995)(statement by co-sponsor Senator Hatch); *see also Communication Workers of America v. Beck*, 487 U.S. 735, 762 (1988)(noting that statutory language should be interpreted consistently with language from similar statute serving similar purpose); *Amoco Production Co. v. Gambell*, 480 U.S. 531, 552 (1987)(same).

Further undermining the respondent's position is this Court's decision in *Wilson v. Seiter*, 501 U.S. 294, 299-300 (1991). In *Wilson*, this Court rejected as having no Eighth Amendment significance the very distinction relied upon by the Court of Appeals, i.e., between specific acts directed at individuals and long-term conditions or conditions broadly affecting the larger inmate population. Significantly, the Court emphasized that "specific acts or omissions directed at individual prisoners" were "conditions of [their] confinement, whether or not the deprivation is inflicted upon everyone else." *Id.* at 299 n. 1.

This Court's decisions in *Preiser*, *Bronson*, and *Wilson* are also important for their temporal relationship to the passage of Section 1997e(a). When Congress passed Section 1997e(a) in 1996, requiring exhaustion of administrative remedies in actions "with respect to prison conditions," it did so against a backdrop of this Court

having construed essentially identical language from the Magistrates Act in *Bronson* just five years earlier. That judicial backdrop also included the Court having employed similar language both in applying the federal *habeas corpus* statutes -- 8 U. S. C. §§ 2241 and 2254 – in *Preiser* and in discussing the *mens rea* requirement for Eighth Amendment claims in *Wilson*. The Court can "certainly presume ... when Congress selected this language, our elected representatives were familiar with [the Court's] recently announced opinions concerning prisoner petitions." *Bronson*, 500 U.S. at 140; *see also Booth*, *supra*, 121 S.Ct. at 1825 (presuming that Congress was aware of the Court's decision in *McCarthy v. Madigan*, 503 U.S. 140 (1992), concerning exhaustion of administrative remedies when it passed Section 1997e(a)). More generally stated, "[w]hen administrative and judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its administrative and judicial interpretations as well." *Bragdon v. Abbot*, 524 U.S. 624, 645 (1998)(*citing Lorillard v. Pons*, 434 U.S. 575, 580-581 (1978)). By selecting the very language this Court has consistently used, it can be assumed, therefore, that Congress in passing Section 1997e(a) intended a construction of the phrase "action ... with respect to prison conditions" consistent with this Court's decisions in *Preiser*, *Bronson*, and *Wilson*.

In sum, the cases relied upon by respondent simply have no bearing on the question now before the Court. In distinguishing excessive force claims from conditions of confinement claims in *Hudson* and *Farmer*, the Court painted a fine point with a narrow brush. Conversely, in *Preiser* and *Bronson*, the reasoning of which this Court endorsed in *Wilson*, the Court employed a far broader brush to make the much more fundamental gate-keeping determination about whether and when certain inmate

claims can be brought to the district court. Because section 1997e(a) requires a court to make a similar preliminary, gate-keeping distinction regarding inmate claims, *Preiser*, *Bronson* and *Wilson* are determinative. Those decisions compel the conclusion that prisoner claims alleging single instances of unconstitutional conduct, including those alleging excessive force, are "actions ... with respect to prison conditions" for purposes of Section 1997e(a).

B. THE COURT NEED NOT INTERPRET THE PHRASE "ACTION ... WITH RESPECT TO PRISON CONDITIONS" TO IMPLY AN EXCLUSION OF EXCESSIVE FORCE CLAIMS IN ORDER FOR THAT LANGUAGE TO RETAIN ITS PLAIN MEANING AND PURPOSE

Respondent argues that that the limiting language of Section 1997e(a), "...with respect to prison conditions," is rendered meaningless if exhaustion is required in all inmate complaints. This argument fails on several levels. First, it is counterintuitive to assume, as respondent's argument necessarily implies, that in passing Section 1997e(a) – "an obviously broader exhaustion requirement" – Congress actually intended to narrow the exhaustion requirement. *See Booth*, 151 S.Ct. at 1825. Second, as discussed above, the term "action ... with respect to prison conditions" simply incorporates the reasoning of *Bronson*, *Preiser*, and *Wilson* to exclude prisoner petitions challenging the fact or duration of confinement. There was no need to apply 1997e(a) to those sorts of petitions, as they are already subject to independent exhaustion requirements. *See Preiser*, 411 U.S. at 498-499. Finally, the limiting language of 1997e(a) has the obvious and sensible effect of excusing exhaustion of claims preceding or entirely unrelated to an inmate's incarceration. For example, there

would be no point in requiring exhaustion of prison grievances in cases seeking civil damages for false arrest and malicious prosecution against arresting officers and prosecutors. Nor would it make sense to require exhaustion in a federal bankruptcy filing.

Respondent makes a related argument that interpreting "action ... with respect to prison conditions" to exclude excessive force cases is inconsistent with its plain meaning. The Court in *Bronson* has already rejected precisely this argument, noting that while the phrase "'challenging conditions of confinement,' when viewed in the isolation, would not [under the most natural reading] include suits seeking relief from isolated episodes on unconstitutional conduct[,]" a claim of excessive force nevertheless concerns conditions of confinement. *Bronson*, 500 U.S. at 139, *quoting* 28 U.S.C. § 636(b)(1)(B). As this Court has noted, if an individual prisoner is deprived of a constitutional right, "that is a condition of *his* confinement, whether or not the deprivation is inflicted upon everyone else." *Wilson*, 501 U.S. at 299 n.1 (emphasis added).[1/]

[1/] At pages 11-12 of his brief, the respondent uses a fictional dialogue to argue the point that "prison conditions" cannot naturally be understood to include excessive force. Indeed, the point could just as easily be made that *excluding* excessive force claims from the meaning of "action...with respect to prison conditions" deprives that phrase of its most natural meaning. Under respondent's approach, the following conversation would be perfectly natural:

Inmate Joe: Bill, how are you finding the conditions in prison?

Inmate Bill: The conditions are fine, Joe, no complaints at all.

Inmate Joe: But, I thought you'd been beaten severely by a guard?

Inmate Bill: Well yes, but I thought you were asking about prison conditions.

C. THE APPROACH THE RESPONDENT ADVOCATES AND THE COURT OF APPEALS ADOPTED IMPOSES BURDENS ON DISTRICT COURTS THAT UNDERMINE THE BASIC PURPOSES OF THE PLRA

As discussed above, the Court's decisions have emphasized that inmate claims under 42 U.S.C. § 1983 are to be categorized in a manner that is easy for district judges to apply, avoids collateral litigation, and otherwise reduces burdens on the courts. This is in perfect harmony with Congress' overarching goals in enacting the PLRA. The Court of Appeals' definition of "action ... with respect to prison conditions" as excluding "single or momentary matters" directly contravenes the PLRA's purposes and this Court's admonitions by creating uncertainty and increasing the work of the District Courts. Indeed, even in the short time since the Court of Appeals' decision in this case, the detrimental effects of its ruling are manifest.

In *Bronson*, this Court made clear that assigning prisoner cases to just two broad categories -- those challenging the fact or duration of confinement itself and those challenging the conditions of confinement, including excessive force cases -- "avoids the litigation that otherwise would inevitably arise in trying to identify the precise contours of [the] suggested exception for single episode cases." *Bronson*, 500 U.S. at 143. The Court noted further that identifying petitions challenging conditions of confinement in the manner now employed by the Court of Appeals "would generate additional work for the district courts because the distinction between cases challenging ongoing conditions and those challenging specific acts of alleged misconduct will often be difficult to identify." *Id.*; *see also Wilson*, 501 U.S. at 300-01 (rejecting as defying "rational implementation" a short-term/one-time v. continuing/long-term method of classifying Eighth Amendment claims, noting that "apart from the difficulty of

determining the day or hour that divides the two categories (Is it the same for all conditions?), the violations alleged in specific cases often consist of composite conditions that do not lend themselves to such pigeonholing.")

Respondent seeks to assure the Court that no such difficulties are presented under the facts of this case. *See* Respondent's Brief at 16-17. Of course, the Court of Appeal's ruling was not limited to the facts of this case, but rather announced a general exclusion from the exhaustion requirement of "single or momentary matters." *See Nussle*, 224 F.3d at 101. More fundamentally, respondent's argument ignores the allegations of his own complaint, which asserts that his assault was just one part of a "prolonged and sustained pattern of harassment and intimidation by corrections officers[.]" *See* Complaint, J.A. 49, ¶ 9. It is difficult to imagine a clearer example of the line-drawing problem highlighted in *Bronson* and *Wilson*.

Perhaps the most persuasive arguments against the Court of Appeals' construction of 1997e(a) are provided by that court's own post-*Nussle* rulings, which have dramatically expanded the exclusions from the PLRA's exhaustion requirement beyond excessive force claims and created the very confusion and collateral litigation this Court has warned against in *Bronson* and *Wilson*. This is because the Court of Appeals has not merely excluded from the exhaustion requirement cases alleging "isolated sadistic acts of violence," as respondent suggests. The Court of Appeals has now clarified that exhaustion is only required where allegations concern "circumstances affecting everyone in the area" and where "the challenged conduct ...was either clearly mandated by a prison policy or undertaken pursuant to a systemic practice." *Marvin v. Goord*, 255 F.3d 40, 42-43 (2d Cir. June 19 2001); *see also Lawrence v. Goord*, 238 F.3d 182, 185 (2d Cir. 2001), *petit. cert. filed*, 69 U.S.L.W. 3702 (U.S. Apr. 17, 2001). Indeed, since *Nussle*, the Second Circuit Court of Appeals

has excused exhaustion in cases in which inmates allege: denials of their access to mail, a violation of their religious freedom and deliberate indifference to medical needs; *Marvin*, 255 F.3d at 42-43; unconstitutional drug testing procedures; *Giano v. Goord*, 250 F.3d 146, 150 (2d Cir. 2001); and retaliatory conduct; *Lawrence v. Goord*, 238 F.3d at 185.[2/]

The Court of Appeals has itself had difficulty applying its PLRA exhaustion jurisprudence, having been forced to remand at least two cases for further proceedings to determine if exhaustion is required. *See, e.g., Royster v. United States*, 2001 U.S. App. LEXIS 7249 (2d Cir. April 16, 2001)(vacating dismissal of claim of denial of access to legal documents and remanding for further proceedings in light of *Nussle* and *Lawrence*); *Martin*, 255 F.3d at 43 (vacating dismissal of claims of denial of legal mail, interference with religious practice, and deliberate indifference to medical needs for further proceedings in light of *Nussle* and *Lawrence*). The Court of Appeals has also expressly reserved the question inevitably created by the post-*Nussle* decisions of "whether exhaustion is required if the challenged conduct is undertaken pursuant to a prison policy which vests discretion in correctional employees to act or not act[.]" *Id.* at 43 n. 2. Adding further confusion, the Second Circuit has yet to offer any guidance to district courts on how mixed claims -- claims

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2/ In fact, the Second Circuit Court of Appeals is so hostile to the notion of PLRA exhaustion that, even after this Court rejected futility as an exception to the exhaustion requirement in *Booth v. Churner*, 121 S.Ct. 1819, 1825 n. 6, it continues to instruct district courts to determine whether "in the context of [a] request for preliminary injunctive relief, exhaustion under the PLRA is required when the remedy sought ... is available in the administrative context but, because of exigencies of the situation, the remedy may be ineffective[.]" *Marvin*, 255 F.3d at 43.

alleging single incidents as part of, or in addition to, systemic or long-lasting constitutional violations -- like respondent's, should be handled.

Exemplifying the confusion created by *Nussle* and its progeny is the Court of Appeals' decision in *Neal v. Goord*, 2001 U.S. App. Lexis 21456, * 11 (2d Cir. Oct. 4, 2001). In *Neal*, the inmate alleged that he had been singled out for denial of medical treatment, an allegation presumably sufficient to excuse exhaustion under *Nussle* and its progeny. The Court of Appeals held: "Taken to its logical conclusion, plaintiff's argument would ultimately preclude almost all prisoner complaints from falling under the exhaustion requirement. Since most prisoners file suits regarding an alleged deprivation suffered individually -- as opposed to litigating claims on behalf of an entire prison population -- were we to adopt the standard advanced by plaintiff, it would render § 1997e(a) a nullity." *Id.* at * 11-12. This statement rephrases the line-drawing problem created by *Nussle* and highlighted by this Court in *Bronson* and *Wilson*. However, having recognized the inherent difficulties created by *Nussle* and progeny, the Court of Appeals in *Neal* did nothing to clarify its PLRA exhaustion jurisprudence. To the contrary, the *Neal* decision further complicated the exhaustion analysis in cases challenging the application of general policies to particular inmates, requiring district courts to scrutinize complaints for allegations that the inmate received treatment that was "different and more particularized than ... generally received by other prisoners." *Id.* at *12-13. [v]

[v] Curiously, the *Neal* Court affirmed dismissal for failure to exhaust without remanding for further factual development, in direct contradiction to what it had done in *Marvin*, also a prisoner case alleging inadequate medical care. *Neal*, 2001 U.S. App. LEXIS 21456, * 10 (acknowledging with regard to the issue of remand that "[i]n other cases where we have reviewed district court decisions issued prior to *Lawrence* and *Nussle*, we have adopted different

Specifically, district court within the Second Circuit must now make the following determinations before enforcing 1997e(a)'s exhaustion requirement:

1. whether the challenged circumstance[s] affected one inmate or everyone in the area;
2. whether the challenged circumstance[s] were momentary or enduring;
3. whether the challenged circumstance[s] were clearly mandated by policy;
4. whether the challenged circumstance[s] were undertaken pursuant to a systemic practice;
5. whether the remedy sought is available in the administrative context;
6. if the remedy is available, whether there are exigencies that might cause the remedy to be ineffective, and
7. if the inmate is challenging a general policy or practice, whether the inmate received treatment different and more particularized than generally received by other prisoners.

These questions are, of course, more easily stated than answered, potentially requiring significant discovery

approaches."); *see also Giano*, 250 F.3d at 150-150 (holding without requiring further proceedings that challenge to drug testing as applied to plaintiff must be exhausted). The Court of Appeals has justified the discrepancy between remanding in *Marvin* and failing to do so in *Giano*, yet another case relating to medical procedures, on the basis that Giano clearly had effective remedies available to him but the record in *Marvin* did not permit such a conclusion. *See Neal* 2001 U.S. App. Lexis 21456, * 10. Given that *Booth* has foreclosed any effectiveness inquiry regarding administrative remedies, this explanation is plainly inadequate to dispel the mounting confusion created by the Court of Appeals in this area.

and fact-finding. Thus, far from easing the burdens created by inmate lawsuits as intended by Congress in passing the PLRA, *Nussle* and its progeny have grafted layer upon layer of complexity onto what could and should be a simple inquiry under Section 1997e(a).[4]

D. RESPONDENT'S REMAINING ARGUMENTS LACK MERIT

Respondent's remaining arguments also lack merit. His first argument is that, because excessive force is unconstitutional, it simply cannot fall within the definition of a prison condition. *See* Respondent's Brief at 3-6. This argument is a masterpiece of circularity. Practically every prisoner petition alleges the violation of one or more federal constitutional rights. It cannot possibly follow, therefore, that because a prisoner alleges a constitutional violation, even a serious one, his complaint does not concern a "prison condition" and is not subject to exhaustion. Nor is there any merit to the suggestion that the PLRA requires district courts to classify and manage excessive force claims differently than other claims asserted in an action under 42 U.S.C. § 1983. *Wilson v. Garcia*, 471 U.S. 261, 266 (1985)(requiring uniformity of treatment for all claims asserted under 42 U.S.C. § 1983, regardless of constitutional right at issue, for purposes of statute of limitations). In addition, respondent apparently fails to appreciate that *Nussle* and its progeny have the effect of requiring inmates alleging long-term, systemic patterns of excessive force to exhaust administrative remedies.

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[4] Not only has the Court of Appeals created complexity where none is necessary, it has also laid the groundwork for truly absurd results. Presently, an inmate alleging a brief, relatively minor assault by a rogue corrections officer may proceed directly to federal court, while an inmate alleging systemic, prolonged and severe brutality may not.

In a similar vein, respondent argues that including excessive force claims within the ambit of Section 1997e(a) would render the defense of qualified immunity a redundancy. *See* Respondent's Brief at 19-20. In particular, respondent argues that "qualified immunity would be applicable in every case in which the force used was indeed a condition of confinement, that is, standard or widespread within the prison or approved by administrators." *Id.* at 20. The respondent has gotten well ahead of himself and the Court. The questions now before this Court are whether excessive force is a prison condition, and whether it was appropriate for the Court of Appeals to define prison conditions to include only practices that are standard or widespread within the prison and/or approved by administrators. The defense of qualified immunity is simply irrelevant in the present context. The PLRA's exhaustion requirement has no bearing at all on the eventual availability of qualified immunity. Section 1997e(a) exhaustion, unlike qualified immunity, does not provide a substantive defense against liability or require any judicial determinations of the reasonableness of a defendant's conduct, but rather simply concerns what the prisoner must do before the district court will entertain his lawsuit.

CONCLUSION

For the foregoing reasons, as well as the arguments asserted in petitioners' opening brief and in the briefs of the *amici*, this Court should reverse the judgment of the Court of Appeals and remand this case to that court with directions to affirm the District Court's dismissal.

Respectfully submitted,

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